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24 *Bard Peripheral Vascular, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

IN RE: Bard IVC Filters Products Liability Litigation

No. 2:15-MD-02641-DGC

DEFENDANTS' RESPONSE TO PLAINTIFFS' NOTICE RE: SNF CASES

(Assigned to the Honorable David G.
Campbell)

1 In their recently filed Amended Notice re: Status of SNF Cases (Doc. 12356), the
2 Plaintiffs reveal that roughly 39 individual cases involving the Simon Nitinol Filter will
3 be seeking remand to their transferor jurisdictions. The Defendants object to the remand
4 of those cases, and ask this Court to delay remand pending a decision by the Judicial
5 Panel on Multidistrict Litigation (“JPML”) as to whether this MDL should be expanded to
6 include those cases or a separate MDL should be created to centralize discovery in those
7 cases.

8 As this Court has previously recognized (Doc. 11659 at 4), the JPML’s original
9 order creating MDL No. 2641 contemplated the transfer of cases involving Bard’s
10 “retrievable” filters. By definition, that transfer order therefore did not include Bard’s
11 Simon Nitinol Filter, which is a permanent filter that cannot be percutaneously retrieved.
12 Nonetheless, almost 100 plaintiffs filed lawsuits in this MDL involving the Simon Nitinol
13 Filter. Only limited discovery, however, has been conducted in this MDL concerning the
14 Simon Nitinol Filter. Further, none of the Plaintiffs’ expert witnesses have alleged a
15 defect in the Simon Nitinol Filter. To the contrary, a number of the Plaintiffs’ experts
16 laud the permanent filter, and tout it as a “reasonable alternative design.”

17 Given those circumstances, Bard raised at an earlier conference what should be
18 done with the approximately 100 cases involving that filter. The Plaintiffs recently
19 indicated that the majority of those plaintiffs would simply dismiss their cases, but 39
20 plaintiffs are insisting on maintaining their actions, and seeking remand to their individual
21 transferor courts. Bard therefore faces the specter of having to do repetitive discovery in
22 39 individual cases, in multiple jurisdictions throughout the country.

23 Such a scenario is antithetical to the purposes of an MDL – to serve the
24 convenience of the parties and witnesses and promote the just and efficient conduct of the
25 litigation. *See 28 U.S.C. § 1407(a).* The JPML has consistently held that “[c]entralization
26 will eliminate duplicative discovery, avoid inconsistent pretrial rulings (including with
27 respect to discovery, privilege, and *Daubert* motion practice), and conserve the resources
28 of the parties, their counsel and the judiciary.” *In re: Bard IVC Filters Prod. Liab. Litig.,*

1 122 F. Supp. 3d 1375, 1376 (J.P.M.L. 2015); *see also In re Pradaxa (Dabigatran*

2 Etexilate) Prods. Liab. Litig., 883 F. Supp. 2d 1355, 1356 (J.P.M.L. 2012)

3 (“Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings;

4 and conserve the resources of the parties, their counsel and the judiciary”); *In re DePuy*

5 *Orthopaedics, Inc.*, 753 F. Supp. 2d 1378, 1379 (J.P.M.L. 2010) (“Centralization under

6 Section 1407 will eliminate duplicate discovery, prevent inconsistent trial rulings on

7 discovery and other issues, and conserve the resources of the parties, their counsel and the

8 judiciary”).

9 It is beyond dispute that like the actions pending in this MDL, “there will be

10 significant overlaps in factual issues, parties, and claims,” as well as discovery, in these 39

11 cases. *In re Generic Digoxin & Doxycycline Antitrust Litig.*, 222 F. Supp. 3d 1341, 1343

12 (J.P.M.L. 2017). “The actions likely will involve overlapping discovery concerning many

13 of the same scientific studies, common expert witness issues, and duplicative pretrial

14 motions.” *In re Viagra (Sildenafil Citrate) Prod. Liab. Litig.*, 224 F. Supp. 3d 1330, 1332

15 (J.P.M.L. 2016). Moreover, “the same witnesses are likely [to be] subject to discovery

16 across all actions.” *In re Generic Digoxin & Doxycycline Antitrust Litig.*, 222 F. Supp. 3d

17 at 1343. “Even if plaintiffs’ counsel [] successfully coordinat[e] their discovery efforts

18 and scheduling, re-litigation of the same issues in different courts [will] significantly

19 impact[] the parties and the judiciary.” *In re: Bard IVC Filters Prod. Liab. Litig.*, 122 F.

20 Supp. 3d at 1376. Thus, “[c]oordination of common discovery will be essential to

21 avoiding duplication and inconvenience to the parties, witnesses, and the courts,” as well

22 as preventing the “significant risk of inconsistent rulings regarding the scope of

23 discovery” and other pretrial matters. *In re Generic Digoxin & Doxycycline Antitrust*

24 *Litig.*, 222 F. Supp. 3d at 1343.

25 Given the benefits that coordinated pre-trial discovery would provide for the Simon

26 Nitinol cases, the Defendants would like to ask the JPML to either expand the scope of the

27 present MDL to include those cases or create a new MDL solely for the Simon Nitinol

28 cases. The JPML certainly has the authority to expand the scope of MDL 2641 to include

1 the Simon Nitinol cases. *See, e.g. In re Generic Digoxin & Doxycycline Antitrust Litig.*,
 2 222 F. Supp. 3d at 1343-44 (expanding scope of MDL 2724 beyond generic digoxin and
 3 doxycycline to include these and other generic drugs allegedly subject to similar and
 4 overlapping price fixing conspiracies); *In re Viagra (Sildenafil Citrate) Prod. Liab. Litig.*,
 5 224 F. Supp. 3d at 1332 (expanding scope of MDL No. 2691 to include both Viagra and
 6 Cialis products). Alternatively, if this Court would prefer not to accept an expanded MDL
 7 at this juncture, or if the JPML were to determine that this MDL is too far advanced to be
 8 expanded, the Panel would then have the authority to create a new MDL for those cases.
 9 *See, e.g., In re: Coloplast Corp. Pelvic Support Sys. Prod. Liab. Litig.*, 883 F. Supp. 2d
 10 1348, 1350 (J.P.M.L. 2012).

11 For those reasons, the Defendants ask that this Court delay any remand of the
 12 Simon Nitinol Filter cases. Following the completion of the Hyde trial that is ongoing,
 13 the parties can then meet and confer as to whether they can agree on a joint request to the
 14 JPML regarding the handling of those cases, either through an expansion of this MDL or
 15 the creation of a new one. The Defendants would contemplate filing a motion with the
 16 Panel by November 1, 2018, either jointly with the Plaintiffs or solely on behalf of the
 17 Defendants, depending on whether the parties could reach an agreement.

18 RESPECTFULLY SUBMITTED this 21st day of September, 2018.

19 s/Richard B. North, Jr.

20 Richard B. North, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/Richard B. North, Jr.
Richard B. North, Jr.